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No. 84-1024

IN THE

Supreme Court of the United States

October Term, 1984

IN RE: GEORGE E. EWING, Debtor,
DONALD R. CALAIARO, Trustee,
Petitioner,

vs.

PITTSBURGH NATIONAL BANK and
COVENTRY CARE, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT, PITTSBURGH NATIONAL BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT, PITTSBURGH NATIONAL BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Petitioner Donald R. Calaiaro (hereinafter "the Trustee"), the Trustee in the bankruptcy proceedings of George E. Ewing (hereinafter "Ewing") at Bankruptcy No. 80-1277 in the United States Bankruptcy Court for the Western District of Pennsylvania, filed a Complaint

at Adversary No. 82-104 to avoid an allegedly fraudulent transfer from Respondent Pittsburgh National Bank (hereinafter "PNB")[1] to Respondent Coventry Care, Inc. (hereinafter "Coventry"). After considering Coventry's Motion to Dismiss, joined in by PNB, the Bankruptcy Court declined to dismiss the Trustee's Complaint. *In re Ewing*, 33 B.R. 288 (Bkrtcy., W.D. Pa. 1983). *rev'd* 36 B.R. 476 (W.D. Pa. 1984) *aff'd* 746 F.2d 1466 (3rd Cir. 1984). On appeal, however, the United States District Court for the Western District of Pennsylvania filed an Opinion and entered an Order dated January 19, 1984, wherein it reversed the Bankruptcy Court and ordered that the Trustee's Complaint be dismissed. *In re Ewing*, 36 B.R. 476 (W.D. Pa. 1984), *aff'd* 746 F.2d 1466 (3rd Cir. 1984).

The Trustee thereafter filed an Appeal to the United States Court of Appeals for the Third Circuit. On September 18, 1984, the Third Circuit affirmed without opinion, *In re Ewing*, 746 F.2d 1466 (3rd Cir. 1984); and on October 15, 1984, the Trustee's Petition for Rehearing was denied. The Trustee has now filed a Petition for a Writ of Certiorari with this Honorable Court.

As stipulated by the parties, the facts upon which the Trustee's claim was based were as follows. On or about September 30, 1977, Ewing borrowed $67,000.00 from PNB as evidenced by a 90-day Note and Pledge Agreement. This loan was extended for additional periods of time and on June 27, 1978, Ewing executed a Promissory Note and Pledge Agreement to secure an additional 90-day extension. The Promissory Note and Pledge Agreement provided for Ewing's pledge and deposit with PNB of various shares of the Class A and

[1] A listing of all parent companies, subsidiaries and affiliates of Respondent Pittsburgh National Bank is attached to the Entry of Appearance being filed by Pittsburgh National Bank's counsel.

Class B common stock of Coventry. This stock was legended with restrictions relating to its transfer or assignment.

Following a default in the repayment of the debt to PNB, a closed bid sale was held to liquidate the stock pursuant to PNB's rights under the June 27, 1978 Note and Pledge Agreement. Prior to the sale PNB advertised in the Wall Street Journal and the Pittsburgh Post-Gazzette and sent notices to numerous potentially interested parties advising them of the sale and the conditions thereof. The sale of the stock was consummated on April 10, 1980, with the stock being sold for $72,500.00 to Coventry, the only bidder at the sale.

Thereafter, in August of 1980, Ewing commenced a voluntary Chapter 11 bankruptcy proceeding which was subsequently converted to a Chapter 7 proceeding. On January 15, 1982, the Trustee filed his Complaint seeking to have the sale of the stock rescinded or a judgment entered against PNB and Coventry for the market value of the stock, legal fees and costs, less the amount of the indebtedness to PNB. In his Complaint, the Trustee alleged that PNB's sale of the pledged stock rendered Ewing insolvent and that the sale was for substantially less than a reasonably equivalent value. These allegations were assumed to be true only for purposes of the Motion to Dismiss.

Summary of Argument

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Cases having only an isolated significance and no public importance should not be reviewed. In the present case both of the Bankruptcy Code provisions relevant to the dispute were significantly amended while the case was pending on appeal. The proper interpretation of these now outdated provisions is therefore of importance only to the parties. No writ of certiorari should be issued to review this question which is of no public concern.

No writ of certiorari need be issued in any event, because the Third Circuit's affirmance of the lower court was proper and correct. PNB's sale of Ewing's pledged stock in 1980 was not a transfer within the meaning of the fraudulent conveyance provisions of former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984), but was instead the enforcement of the prior transfer under which PNB acquired its security interest. Former Section 548 was intended to apply only to transfers in which the debtor was the seller or otherwise participated in the transaction.

The Trustee's Petition for Writ of Certiorari should therefore be denied.

Reasons For Denying Certiorari

A. There Are No Special Or Important Reasons For Granting Certiorari In This Case.

As clearly delineated in Rule 17 of the U.S. Sup. Ct. Rules, 28 U.S.C.A., "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." No such reasons exist in the present case.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955) (decided under the similar provisions of former Rule 19 of the U.S. Sup. Ct. Rules), this Court elaborated on the criteria under which the Court determines whether a particular case merits consideration. At 349 U.S. 74, the Court stated:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. [citations omitted] "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

In *Rice* certiorari had been granted and the Court had affirmed without opinion because it was evenly divided. In considering a petition for rehearing, the Court's attention was directed to a statute enacted after the litigation in question had been initiated. The statute barred the question presented from again arising. Because the case thus had only an isolated significance, the Court vacated its affirmance and dismissed the writ of certiorari as having been improvidently granted. See also *District of Columbia v. Sweeney*, 310 U.S. 631 (1940)

(certiorari denied because the tax was laid under a statute which had been repealed and the question was therefore not of public importance). *Cf. Cook v. Hudson*, 429 U.S. 165 (1976) (writ of certiorari dismissed as improvidently granted in light of intervening Supreme Court decision and state statute).

In the present case a similar situation exists. The issue being litigated is whether the sale of Ewing's stock by PNB was a transfer within the meaning of the fraudulent transfer provisions of the Bankruptcy Code. However, after the initiation of this lawsuit both 11 U.S.C.A. §101(40) (1979) (amended and renumbered as §101(48) 1984) and 11 U.S.C.A. §548 (amended 1984), the relevant Bankruptcy Code provisions, were significantly amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). Thus, regardless of whether the Trustee or PNB and Coventry were correct with respect to the interpretation of the prior bankruptcy law, the resolution of that question is now only of significance to the litigants in this case. Compare *Rice v. Sioux City Cemetery, supra.* The question is no longer of public importance. Compare *District of Columbia v. Sweeney, supra.* There are, therefore, no special or important reasons for granting certiorari in this case.

The Trustee argues that there is a split in the Circuits with respect to this issue and that certiorari should therefore be granted. Compare *In re Madrid*, 725 F.2d 1197 (9th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 125 (1984); and *In re Ewing*, 36 B.R. 476 (W.D. Pa. 1984) *aff'd without opinion* 746 F.2d 1466 (3rd Cir. 1984) with *In re Hulm*, 738 F.2d 323 (8th Cir. 1984) *cert. denied*, _____ U.S. _____, 105 S.Ct. 398 (1984); *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981) *cert. denied* 454 U.S. 1164 (1982) (decided

under the prior Bankruptcy Act); and *Durrett v. Washington National Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (decided under the prior Bankruptcy Act). This apparent split has become of isolated significance, however, because of the amendment of those provisions of the Bankruptcy Code which underlay the Circuit Courts' differences of interpretation. Indeed, this Court has apparently recognized the lack of special and important reasons for reviewing these now outdated provisions because it has recently denied certiorari in both the *Madrid* case and the *Hulm* case despite their obviously opposing conclusions.

Similarly without merit is the Trustee's argument that certiorari should be granted because the Third Circuit's decision is contrary to the intent of Congress. While a determination of Congress' intent when it enacted former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984), might satisfy a scholarly interest in the question, it would be an academic exercise solely for the benefit of the litigants in this case. The resolution would be of no public importance. See *District of Columbia v. Sweeney*, *supra*. *Cf. Rice v. Sioux City Cemetery*, *supra*.

Finally, the Trustee argues that certiorari should be granted because the *Ewing* case is in conflict with Pennsylvania decisions concerning the property rights of pledgors under the Pennsylvania Uniform Commercial Code, Pa. Cons. Stat. Ann. §§1101 *et seq.* (Purdon 1984). A conflict between a federal court of appeals and a state court of last resort is only a basis for granting certiorari, however, where a federal question is involved. See Rule 17.1(a) of the U.S. Sup. Ct. Rules, 28 U.S.C.A. Thus, to the extent the Trustee is claiming that the lower court improperly interpreted Pennsylvania law, there is no federal question involved, and this Court should decline to take jurisdiction.

B. There Is No Need To Grant Certiorari In Any Event Because The Lower Court's Decision Is Correct.

Former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984), provided in relevant part:

> (a) The trustee may avoid, any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor—
>
> * * *
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation, . . .

Although the Trustee alleged that PNB's sale of the pledged stock rendered Ewing insolvent and that the sale was for substantially less than a reasonably equivalent value, the Trustee could only have stated a claim against PNB and Coventry if PNB's sale of the pledged stock to Coventry was a "transfer" within the meaning of former Section 548 of the Code, 11 U.S.C.A. §548 (1979) (amended 1984).

The question of whether a particular occurrence is a transfer for purposes of the Bankruptcy Code is a matter of federal characterization. See *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945); *In re Madrid, supra; In re*

Hulm, supra. Former Section 548(d)(1) of the Code, 11 U.S.C.A. §548(d)(1) (1979) (amended 1984), specifically defined "transfer" as follows:

> For purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

Thus, for purposes of former Section 548 a transfer was made when it was so far perfected that a bona fide purchaser from the debtor could not have acquired an interest in the property superior to that of the original transferee. *In re Madrid, supra; In re Alsop,* 14 B.R. 982 (Bkrtcy., D. Alaska 1981) *aff'd* 22 B.R. 1017 (D. Alaska 1982). *Cf. In re MacQuown,* 717 F.2d 859 (3rd Cir. 1983).

The question of when a transfer has been so far perfected as to be good against a subsequent bona fide purchaser is a matter to be decided under the applicable state law. *In re Madrid, supra; In re Alsop, supra.* Under Pennsylvania law, there is no question but that PNB perfected its security interest when Ewing pledged and deposited his stock with PNB. See 13 Pa. Cons. Stat. Ann. §§9303(a), 9304(a), 9305, 8102 (definition of "security") and 9105 (definition of "instrument") (Purdon 1984).

There can be no real dispute, therefore, but that the pledge and deposit of Ewing's stock with PNB constituted a transfer within the meaning of 11 U.S.C.A. §548(d)(1) (1979) (amended 1984). Since the pledge and

deposit of Ewing's stock with PNB occurred more than a year prior to Ewing's initiation of bankruptcy proceedings, the transfer was not subject to attack under the former provisions of 11 U.S.C.A. §548 (amended 1984).

It was the Trustee's contention, however, that the involuntary sale of the stock on April 10, 1980, also resulted in a "transfer" of Ewing's equitable interest in the stock. The Trustee's argument focused primarily upon the question of whether the debtor maintained any interest in the collateral after he had pledged it. The relevant concern, however, was not whether such an interest existed, but whether the foreclosure of that interest through an involuntary sale to enforce PNB's rights as a secured party constituted a transfer within the meaning of former Section 548 of the Bankruptcy Code, 11 U.S.C.A. §548 (1979) (amended 1984). Clearly it did not.

As noted above, for purposes of former Section 548 a transfer was made when it was so far perfected that a bona fide purchaser from the debtor could not acquire an interest in the property superior to that of the original transferee. *In re Madrid, supra; In re Alsop, supra.* Thus, the transfer occurred when PNB perfected its security interest so that no subsequent purchaser from Ewing could acquire an interest in the stock which was superior to that of PNB. Whatever equitable interest in the stock Ewing may have retained was clearly not superior to PNB's security interest; and any conveyance by Ewing of his equitable interest in the stock would always be subject to the pledge and PNB's rights thereunder. See 13 Pa. Cons. Stat. Ann. §9306(b) (Purdon 1984); Zinman, Houle and Weiss, *Fraudulent Transfer According To Alden, Gross and Borowitz, A Tale of Two Circuits*, 39

Bus. Law. 977, 1000 (1984). For purposes of former Section 548 the transfer occurred when PNB's security interest was perfected so that it was superior to the interest of any purchaser at a subsequent sale by Ewing of his equitable interest. PNB's sale of the stock to Coventry was not a transfer within the meaning of former Section 548, but was instead the enforcement of the previous transfer under which PNB acquired its security interest. Coppel and Kann, *Defanging Durrett: The Established Law of "Transfer"*, 100 Banking L.J. 676, 678 (1983).

In arguing to the contrary, the Trustee attempted to utilize the broad general definition of "transfer" then contained in former Section 101(40) of the Bankruptcy Code, 11 U.S.C.A. §101(40) (1979) (amended and renumbered as §101(48) 1984). It was, however, the more limited definition of former Section 548(d)(1) which controlled. *In re Madrid, supra; In re Alsop, supra.* Former Section 548(d)(1) specifically provided that its provisions were applicable "For purposes of this section." Thus, what might have constituted a transfer under former Section 101(40) was not necessarily a transfer under former Section 548. See *In re Madrid, supra; In re Alsop, supra.* For purposes of former Section 548's avoidance provisions, only Section 548(d)(1) transfers were relevant.

The Trustee's arguments also overlooked or ignored this Court's precedent, as well as that of several of the Circuit Courts of Appeal, all of which had concluded in essence that the pre-petition enforcement of a valid lien was not a transfer within the meaning of the bankruptcy laws. See *Thompson v. Fairbanks*, 196 U.S. 516 (1905) and the numerous Circuit Court cases and other authorities compiled and discussed in Coppel and Kann, *supra* at 682-691.

Moreover, it is clear that former Section 548(a) was intended to apply only to transfers in which the debtor was the seller or otherwise participated in the transaction. *In re Madrid, supra* (Farris, J. concurring). See also *Abramson v. Lakewood Bank & Trust Co., supra* (Clark, J. dissenting). This limited scope is substantiated by a review of the origins of former Section 548 as developed by the Ninth Circuit in *In re Madrid, supra*, and by the authors in the article by Zinman, Houle and Weiss, *supra*.

> As was true with . . . earlier fraudulent conveyance laws, [former] Section 548 [was] not primarily concerned with the "preservation of the debtor's estate" or with "ensur[ing] a fair return on the debtor's assets for the benefit of all creditors" . . . . Rather, these fraudulent conveyance laws have always sought primarily *to prevent transfers by the debtor* that place the debtor's property beyond the reach of creditors who are entitled to realize upon that property. [footnotes omitted, emphasis added]

Zinman, Houle and Weiss, *supra*, at 994. Thus, under former Section 548 only transfers where the debtor was a participant could be set aside for the absence of reasonably equivalent value. *In re Madrid, supra* (Farris, J. concurring). Because Ewing did not participate in the April 10, 1980, sale of the stock to Coventry, the provisions of former Section 548 had no applications.

Conclusion

Because the provisions of both former Sections 548 and 101(40) have been substantially amended since the initiation of the within lawsuit, the determination of the correct interpretation of their prior wording has become a matter of concern only to the participants in this lawsuit, and is without any public importance. There are, therefore, no special or important reasons for granting certiorari in this case.

Moreover, there is no need to grant certiorari in this case because the affirmance of the lower court by the Third Circuit Court of Appeals was, in any event, proper and correct.

The Trustee's Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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